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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNIFORMED FIRE OFFICERS ASSOCIATION *et al*,

Plaintiffs,

v. 20 Civ. 05441-KPF

BILL DE BLASIO *et al*,

Decision

Defendants.

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New York, N.Y.
August 21, 2020
12:00 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

DLA PIPER US LLP (NY)
Attorney for Plaintiff Uniformed Fire Officers Association
BY: ANTHONY PAUL COLES
COURTNEY GILLIGAN SALESKI

NEW YORK CITY LAW DEPARTMENT
Attorney for Defendants Bill de Blasio, *et al*
BY: DOMINIQUE F. SAINT-FORT
REBECCA GIBSON QUINN
KAMI ZUMBACH BARKER

DEPUTY CLERK: First, this is a public courtroom, even if it's remote. And members of the media and/or public have been known to dial in and listen to proceedings N this instance, we have 126 participants listening in to that point, I'm going to ask that all listening -- listen-only participants place their phones on mute at this time.

We do have a court reporter on the line. I'm going to ask that if you do need to speak during this conference, that you will give your name before you do speak so that way it's clear to the court reporter on who is speaking and the transcript is accurate.

The recording and/or rebroadcasting of this conference is not permitted by any participant. That includes listen-only participants. We will be recording it on our end as a backup to the court reporter T court reporter's transcript is the official transcript for this conference.

I'm just going to remind everybody once again because it's very important with the number of people who we have on the line that you put your phones on mute so that way there is no background noise or feedback interrupting the conference.

With that, do I have any questions regarding the instructions that I have given?

Hearing nothing, I will be bringing in the Judge. Please hold.

(Case called)

DEPUTY CLERK: Counsel for the parties please state your names for the record, beginning with plaintiffs.

Good afternoon, your Honor.

MR. COLES: Tony Coles, for the plaintiffs. And I'm here with Courtney Saleski.

THE COURT: Good afternoon. And thank you very much.

And representing the defendants?

MS. SAINT-FORT: Dominique Saint-Fort, representing defendants, along with Rebecca Quinn and Kami Barker.

THE COURT: Thank you very much. Good afternoon to each of you.

I know there are many amici and other interests parties who are on this call. I'm aware that there are over a hundred lines on this call. So I won't go through the trouble of reading off everyone's appearance. But I did hear my deputy take those appearances this afternoon, so I know that you're all there. And I thank you for appearing. I suspect the beeping that we're now hearing are people joining or exiting the conversation is going to plague us throughout the conversation, but we will deal with it.

Let me please ask the court reporter if she has any difficulty in hearing me.

Okay. Thank you.

I am going to ask everyone else please to mute their phones. I'm going to give the decision now on plaintiffs'

motion for preliminary injunction. And what I can say to you is that it is quite a long decision and so I will do my best to read it carefully. But it will go much easier if I'm not hearing background noises. So since I'm not speaking to any of you specifically at this time, please, please set your phones to mute. Thank you very much. I will now begin.

On June 12th of 2020, Governor Cuomo signed legislation that, in relevant part, repealed New York Civil Rights Law, Section 50-a. That provision, summarily speaking, protected from disclosure under New York's Freedom of Information Law -- or "FOIL" -- certain records regarding police, sheriffs, firefighters, correction officers and peace officers. And as made clear from the submissions of the parties (and even more so, the amici) the repeal was the product of extensive debates, including debates over the continued protection of a narrower class of information derived from these same records. Concurrently, with the repeal, the New York legislature passed amendments to the New York Public Officers Law that added Section 89(2-b) and 89(2-c), the former of which mandated redaction of certain types of personal identifying information and the latter of which allowed (but did not require) law enforcement agencies to "redact records pertaining to technical infractions."

On July 14th, 2020, plaintiffs brought this action in New York State Supreme Court, seeking "to temporarily and

permanently enjoin defendants from releasing unsubstantiated and non-final disciplinary records of firefighters, police, and correction officers" under a variety of theories. On July 15, 2020, defendants removed the matter to this Court, by which time the state court judge had ordered either injunctive relief or a stay until the Court could consider the matter. On July 22nd of 2020, the Court entered a temporary restraining order, finding in relevant part that there were serious issues that transcend reputation, that affect employment, that affect safety, which were accepted as speculative and imminent for purposes of today's proceeding.

Excuse me. I'm sorry. I'm going to pause for a moment. I'm hearing someone in the background. I'm just going to ask again if folks could please mute their phones.

Returning to the decision. I did also find that the plaintiffs had raised sufficiently serious questions going to the merits, particularly on their contractual claims that a TRO was warranted. I ordered expedited discovery. I scheduled a hearing on the application for a preliminary injunction to be held on August 18th of 2020. And on July 28th of 2020, after receiving briefing from the parties and from the New York Civil Liberties Union, I modified the TRO order so that it no longer applied to NYCLU. Plaintiffs appealed that modification to the Second Circuit, and yesterday the Second Circuit denied plaintiffs' motion for a stay pending appeal. And it is my

understanding that NYCLU have posted those records in searchable form on its website.

Between July 22 of 2020, and August 14th of 2020, I received substantial briefing and supporting materials from the parties, as well as the many submissions of the amici. I heard several hours of oral argument on August 18th of 2020. And I want to reiterate my thanks and my appreciation to all of you who prepared materials to aid me in resolving these significant issues.

From oral argument, I understand plaintiffs to be asking me to enjoin defendants from producing reports and records of allegations that were determined to be unsubstantiated, unfounded, truncated, or exonerated; those matters that are non-final; and those allegations that were addressed by settlement agreements between law enforcement officers and agencies entered into before the repeal of Section 50-a. During the TRO hearing, I also directed defense counsel to provide what I call the "final answer from each of the organizational defendants concerning precisely what materials were contemplated to be disclosed."

I learned that CCRB planned "to establish an online database that would allow members of the public to search for CCRB officer histories," including "cases that were substantiated, unsubstantiated, unfounded, and truncated." Of the NYPD plan to publicly release on its website charges and

specifications regardless of whether they had been adjudicated, and responses to FOIL requests for the disciplinary records of members of service received following the repeal of Section 50-a where the requested disciplinary records resulted in a substantiated final determination. I also understood that the FDNY had not yet developed a protocol or a process for the public release of firefighter or fire officer disciplinary records. and the Department of Corrections has not yet made a plan, but has assured plaintiffs it would not release unsubstantiated and non-final allegations. In light of those responses, I understood the focus of plaintiffs' PI motion to be on the NYPD and CCRB materials that I've mentioned earlier, particularly the unsubstantiated, unfounded, truncated, exonerated, non-final, and those addressed by settlement agreements, and I have focused my analysis accordingly. For the reasons set forth in the remainder of this oral opinion, with a very limited exception for certain NYPD materials that I believe to be squarely covered by certain collective bargaining agreements, I am denying plaintiffs' motion.

We'll begin with the relevant legal standard. And "in general, a district court may grant a preliminary injunction if the moving party establishes that it is likely to suffer irreparable injury if the injunction is not granted, and either a likelihood of success on the merits of its claim, or the existence of serious questions going to the merits of its claim

and a balance of hardships tipping decidedly in its favor." I'm quoting there from *Plaza Health Laboratories v. Perales*, a Second Circuit decision from 1989, reported at 878 F.2d, 577.

Lest you think otherwise, I do recognize that there are other factors in the mix. In the most recent decision from the Second Circuit, *New York v. the United States Department of Homeland Security,* a decision that has not yet been given, an F.3d cite that is contained at West Law 2020 WL4457951. Judge Lynch, writing for the Court and citing to the *Winter* decision, also noted the factors of the balance of equities tipping in favor of the movant and that the injunction be in the public interest. He noted as well for the panel that where the government was a party to the suit, the final two factors merged.

During the TRO proceedings, I recognized both formulations of the standard set forth in *Plaza Health Labs*, and I focused in particular on the serious question standard, because that was the basis for my TRO release. The Amicus CPR reminded me, however, that the Second Circuit has held that where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair ground for litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the

merits of his claim.

I'm citing there to *Plaza Health Labs*, but also to the decision this year by the Second Circuit in *Trump v. Deutsche Bank AG*, which was reversed on other grounds by the Supreme Court in the case *Trump v. Mazars, USA*. The Second Circuit has explained that this exception reflects the idea that governmental policies implemented through regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly. And in so doing, they were citing to their prior decision in *Able v. United States* in 1995.

Now, during the PI hearing, plaintiffs' counsel disagreed with CPR's analysis and argued directing my attention to *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs*, 769 F.3d 105 from 2014, that where the Government engages in policy-making and does not take action pursuant to a statutory scheme, the serious-questions standard applies.

I'll note in my review of that case, after the argument, the challenged conduct was actually subjected to review under a likelihood of success standard, which is the standard that I'm finding applicable here today. And it may well be the case that plaintiffs' counsel was, in fact, directing my attention to a case cited within *Otoe-Missouria*, that is, *Haitian Centers Council v. McNary*. And in that case the Second Circuit used the "fair ground for litigation"

standard in upholding an order enjoining INS from limiting Haitian asylum applicants' contact with counsel while detained at Guantanamo Bay. But that case was distinguished in its own text and in *Otoe-Missouria*, the latter of which noted that there the government was seeking to enforce an informal policy "hastily adopted without the benefit of either specific statutory instructions or regulations issued after a public notice-and-comment process." I'm quoting there from 769 F.3d at 111. That reasoning is simply inapplicable here.

Plaintiffs' counsel has emphasized to me that plaintiffs are not litigating the repeal of Civil Rights Law Section 50-a, and so I have focused on whether defendants' post-repeal approaches to responding to FOIL requests qualify as "government action taken in the public interest pursuant to a statutory or regulatory scheme so as to preclude application of the less rigorous serious-questions standard." And I do find that these actions so qualify, and thus that the higher likelihood of success standard applies. With one exception relating to this limited category of NYPD materials I'll talk about later, plaintiffs have not met their burden. But even were I to use the serious-questions standard, the result would be the same. And plaintiffs fail to show that the balance of hardships tips decidedly in their favor.

Turning now to the issue of irreparable harm. It is defined by the Second Circuit as "injury that is neither remote

nor speculative, but actual and imminent that cannot be remedied by an award of monetary damages." I'm quoting here from the 2015 Second Circuit decision in *New York ex rel Schneiderman v. Actavis PLC*. This is the issue on which my prior TRO hearing and ruling was predicated, and it's the issue on which, with a more complete record, I am finding to the contrary.

And I want to make a preliminary observation about irreparable harm. And it relates to the many disclosures that were made by CCRB in the time period between June 12, 2020, the repeal, and July 14, 2020, the filing of this lawsuit. Plaintiffs' counsel argued to me at the PI hearing that these disclosures were immaterial to my analysis, except insofar as they were further indications of violations of their rights. And yet, I fail to see the logic of having me enjoin defendants from disclosing prospectively materials that have already been produced and that are already being published and analyzed by third parties. This would include the CCRB records that NYCLU has just published. To my mind, any injunctive relief that I would order could not put that particular horse back in the bank. But putting the issue aside, I find the plaintiffs have failed to satisfy their burden of showing irreparable harm. Broadly speaking, plaintiffs posit two categories of harm: Reputational harm and loss of privacy; and risk of harm to the officers and their families.

Turning first to the issue of reputation harm: The plaintiffs proffer the expert report of Dr. Jon Shane, who opines in a rather brief expert report that, based on his experience, training and education "to a reasonable degree of professional certainty, publication of unsubstantiated and non-final allegations will have a disproportionate and unfairly damaging and stigmatizing effect on a police officer's future employment prospects. Publication of these allegations will decrease future job prospects and may cause an officer to be deprived of a position he or she applies for. This damaging effect is likely even when allegations are characterized as unsubstantiated or unfounded, and even when they result in exonerated or not-guilty determination."

The defendants have moved to strike Dr. Shane's report based on the timing of the disclosure and his qualifications. I am denying that motion and I am accepting the report. But given it the weight to which it is entitled, it does not suffice to demonstrate irreparable harm. Dr. Shane presents no empirical evidence to support his findings and no anecdotal evidence. His opinion at base is rumination -- reasoning, for example, that if an officer decides to move from one department or law enforcement agency to another, the hiring department or agency will likely give undue and unfair weight to the unsubstantiated and non-final allegations, rendering them stigma, regardless of the agency's intention behind the

release. And yet he has not one law enforcement officer's statement to substantiate his claim. And it's not as though there isn't a universe of information from which he can draw. Quite to the contrary, the NAACP Amicus brief identifies 12 states -- Alabama, Arizona, Connecticut, Georgia, Florida, Ohio, Maine, Minnesota, North Dakota, Utah, Washington, and Wisconsin -- where police conduct records, including unsubstantiated complaints and complaints where no disciplinary action resulted from the investigation, are generally available to the public. On this point, I actually found the declaration of Brendan Cox, who was engaged in the hiring process as chief of the Albany Police Department, to be far more compelling.

Moreover, as defendants note, plaintiffs do not offer any specific evidence that evidence plaintiffs do not offer any specific evidence that anyone is imminently facing something like this. For example, evidence about officer seeking employment, prospective employers, information employers can access already regarding misconduct and disciplinary histories, how they interpret that information, and how public access to data would therefore change any employment calculus. And I am concerned -- and I think I disagree with one of Dr. Shane's underlying premises, which is that it is somehow appropriate to withhold information of this type from prospective law enforcement employers because they are unable to appreciate the dispositional designations used by agencies such as the CCRB.

Here too, I am persuaded by Mr. Cox's statements at paragraph 21 of his declaration regarding the importance of a prospective law enforcement employer having all of this information available and perhaps more importantly for this motion, having the ability to contextualize that information properly. On the record before me I reject the argument that law enforcement officers cannot interpret law enforcement reports from other jurisdictions

Plaintiffs' counsel has also repeatedly focused on the fact that approximately 92 percent of CCRB complaints are resolved using a designation other than substantiated. But that suggests that such a disclosure is more likely to redound to a reputational harm benefit. It appears that plaintiffs are eliding the distinction between the underlying allegation, which may be about conduct that never happened, and the actual record being released which record states the outcome of an investigation into that complaint. As well, any reputation harm can be remedied by money damages. And for those propositions I'm citing *Guitard, v, United States Secretary of the Navy*, 976 F.2d, 737, a Second Circuit decision from 1992; citing the Supreme Court decision of *Sampson v. Murray*, 415 U.S. 61 from 1974; another Second Circuit decision, *Savage v. Gorski*, 850 F.2d 64, a Second Circuit decision from 1998; and a recent decision from a colleague of mine, Judge Oetken, in *Nicholas v. Bratton*, not reported at 2016 WL 3093997, from June

of 2016.

Now, I did not understand plaintiffs to be claiming privacy-based harms separate and apart from reputational harm, and I also don't see a generalize privacy right inherent in the disciplinary records of public employees, so I'm turning now to the second proffered category of irreparable harm. It is an increased risk of harm to law enforcement officers and their families.

(Pause)

THE COURT: And the point I wished to make before I paused was to underscore the fact that no one in this litigation wants any harm to befall any officer or any officer's family member. No one wants an increased risk of harm. But the fact remains that plaintiffs have not met their burden on this record of identifying an increased risk of harm to officers or their families that can fairly be tied to the disclosure or the potential for disclosure of these materials.

The NYPD officers cited by plaintiff who have lost their lives because of their jobs, they are remembered, they are respected. And yet, I have no argument, and there can be no argument, that their deaths were attributable to the repeal of Section 50-a and the consequent changes in how defendant agencies will respond to FOIL requests. Plaintiffs have presented speculation only that these changes in FOIL request responses will increase the risk of officer harm.

I also note that before the state legislature, plaintiffs could not provide a single example where the release of misconduct or disciplinary reports have been linked to officer safety concerns. And the legislature at that time was very keenly attuned to officer safety, which is why it later amended the public officer's law to provide for mandatory redactions of identifying information.

Plaintiffs have cited to me the increase in TAPU investigations. I don't dispute the fact of the increase, but I do not believe that plaintiffs have or can link it to the agency's new positions regarding FOIL request responses. As noted by the amici, there are numerous states with more robust disclosure practices than New York's have been, with no correlative uptick in violence or threats of violence to officers and their families. I'll mention again the NAACP brief and the 12 states that they cite. I don't see any safety issues identified in those states.

The amici have also noted the disclosure practices of the Chicago Police Department, which is a fair comparator to the NYPD. I've seen evidence regarding the Citizens Police Data Project, which contains disciplinary records from Chicago police officers in a comprehensive searchable format. I understand that the data includes more than 30,000 officers, and almost 23,000 complaints between 2000 and 2018. Again, I've been presented with no evidence of increased violence or

threat of violence because of the disclosures.

Plaintiffs' argument also seems to overlook the disclosures that have been historically been made. And I'll only note briefly the correction officer and fire officer information available on oath, since their records aren't really at the heart of this motion. But for decades, until 2016, the NYPD posted officer disciplinary outcomes outside the media room. And for a short time, the CCRB disclosed summary of officers' records in response to FOIL requests.

I'm also going to refrain from relying on the ProPublica disclosure, as it is so recent, and the NYCLU disclosure for the same reason. But there was a prior disclosure in 2018 when Buzzfeed News uploaded 1800 officer disciplinary dispositions to a publicly available online database. And the Legal Aid Society has an online database known as “CAPstat” which includes data from lawsuits against NYPD officers over several years as well as the Buzzfeed data. And I have not seen evidence of an incident in which member officers were threatened or at risk of threat because of that publication.

On the specific issue of "doxing," which came up at this hearing, the legislature took this into account in enacting the new FOIL provision requiring redactions -- not allowing redactions -- for identifying information. And while there has been disclosures made over the years, pursuant to

leaks, plaintiffs have not pointed to an example of a police officer getting doxed as a consequence. They have not explained how the specific information contained in CCRB reports, for example, would make it easier for members of the public to dox officers. That's why I've not found irreparable harm.

I'm going to turn now to the actual claims. And for analytical convenience, I've divided plaintiffs' claims into contractual and constitutional. And beginning with the former, plaintiffs argue that their respective CBAs give them rights that would be violated by the NYPD's and CCRB's contemplated disclosures and databases. I've reviewed the CBAs attach to plaintiffs' petition at Docket entry No. 10. In particular, I've seen CBAs from the Sergeants' Benevolent Association, the Police Benevolent Association, the Lieutenants' Benevolent Association, and the Captain's Endowment Association. And I might be referring to those by abbreviations during this portion of my opinion.

I'm aware, for example, that the SBA, the LBA, the PBA, and the CEA filed grievances with deputy commissioner of the police, Beirne, on July 15th of 2020, claiming that the City had violated their respective CBA rights when it announced the imminent publication of information regarding unsubstantiated, unfounded, exonerated, and unadjudicated departmental allegations against active and retired department

members. I was made aware as well that the City and the NYPD have filed a petition challenging the abitrability with the New York City Board of Collective Bargaining.

All of the CBAs that I've been given contain a section that is typically titled "Personal Folder." It's typically found in Section 7(c) of one of the Articles of the provision. So for the SBA, it's Article 15 Section 7(c). In the PBA's CBA, it is Article 16 Section 17. In the LBA's CBA, it is Article 16 Section 7(c). And in the CEA's CBA -- it's the one outlier -- it's in Article 14 Section 6(c). I'm going to call it Section 7(c) nonetheless -- or maybe it's better for me to call it the "personal folder section." But what it provides is that the department will, upon written request to the chief of personnel by the individual employee, remove from the personal folder investigative reports which, upon completion of the investigation, are classified, exonerated, and/or unfounded.

Citing the personal folder section, plaintiffs have argued that disclosing allegations of misconduct would functionally negate the rights of officers to clear their disciplinary records of unfounded and unsubstantiated allegations where that information would forever be publicly available in the future. And in short, I completely disagree with plaintiffs' broad interpretation of this provision, and in no way do I believe that it can stretch so far as to prevent the disclosure of this information.

The personal folder, as I've just read, the provision gives the officer the right to request that an investigative report be removed from a personnel file. It does not give the officer the right to have the investigative report removed from the public record. And so it remains the case that officers can and will be able to exercise their rights under this provision to have specified investigative reports removed from their personnel or personal folder, and it remains the case that the NYPD can remove such reports. And by that measure, whatever benefits the officers derived from having personal files with this information removed remain available to them, but it does not extend to exclude these materials from the public.

And so, I have thought about whether this is something that is more properly given to the arbitrator. But there is simply no way in which this provision is -- or which the argument being made can be made under the CBAs. And, therefore, this is not a grievance to be arbitrated at all. This is not a situation, as plaintiffs claimed at oral argument, where the Court would be nullifying relief an arbitrator might be able to provide because the relief sought is simply nowhere to be found in the CBA.

I do want to talk, however, about another provision which has given me more pause, and this is the one provision where I am, in part, granting injunctive relief. The CBAs

contain a provision that I will refer to as Section 8. And it appears in substantively identical form in different articles of the CBAs. But it typically provides as follows:

"Where an employee has been charged with a Schedule A violation, and such case is heard in the trial room, and disposition of the charge at trial or on review or appeal therefrom is other than guilty, the employee concerned may, after two years from such disposition, petition the police commissioner for a review for the purpose of expunging the record of the case. Such review will be conducted by a board composed of the deputy commissioner of trials, department advocate, and chief of personnel or their designees. The board will make a recommendation to the police commissioner. The employee concern will be notified of the final decision by the police commissioner -- by the deputy commissioner of trials.

The Court believes that the language of this provision, which refers to expunging the record of the case, is significantly broader than that of the personal folder section that I just mentioned. And although the CBAs are not entirely clear when defining either the scope of expungement or the "record of the case," expunging the record of the case is at least more significant than removing a file from the personnel folder.

I had also thought about defendants' argument to me that Schedule A violations are basically the same as those that

the legislature accounted for in enacting Public Officer's Law Section 89(2-c). But the language of that provision, 89(2-c), only states that a law enforcement agency may redact records pertaining to technical infractions. And so the Court is left with the distinct possibility that certain records that plaintiffs have the right to expunge under their CBAs may not be redacted or withheld. To be clear, it is not clear to me what the Schedule A violation records are and whether this is what's contemplated by the NYPD when they're talking about the disclosure of charges and specifications. And so I do believe this is something that has to be resolved through the arbitration process, or at least that I cannot resolve it on this record.

I have considered arguments that have been made to me that this would be contrary to public policy to permit the CBAs -- to permit plaintiffs through the CBAs -- to block public access to certain records. But I have also thought about the fact that Section 8 pertains only to Schedule A violations, which I understand to be the more technical violations.

And so while I do appreciate the arguments of the defendants in the amici, that the public has an interest in all disciplinary records of NYPD officers, in this particular instance, I don't believe that I can say the that the public interest is enough to surmount the union's contractual rights.

And so for this reason, this is the very limited injunction that I am granting:

The NYPD and CCRB may not disclose records of Schedule A command discipline violations for cases heard in the trial room, for which the ultimate disposition of the charge at trial, or on review or appeal, is other than guilty, which records have been, are currently, or could be in the future the subject of a request to expunge the record of the case pursuant to Section 8, for those officers covered by the PBA, the SBA, and the LBA, collective bargaining agreements.

I'm turning now to the argument of plaintiffs that the NYPD's and CCRB's releases would be an anticipatory breach of negotiated settlement agreements between police officers and NYPD that were entered into before the repeal of Section 50-a. And plaintiffs argue that by operation of law these agreements include the confidentiality protection provided by Section 507-a. Now, as an initial matter, plaintiffs provide no compelling reason why the CCRB would be bound by the settlement agreements between individual officers and the NYPD, to which they're not a party. And I, therefore, don't find that plaintiffs' claim would succeed on the merits as to the CCRB's disclosure. It really boils down to the NYPD's anticipatory breach of these agreements.

And in this regard, plaintiffs have cited *Skandia America Reinsurance Corp. v. Schenck*, 441 F.Supp. 715, a

Southern District decision from 1977, for the proposition that the law enforced at the time a contract is entered into becomes a part of the contract. I do believe the applicability of that case is limited by its fact. And in that case, as it happens, the Court just interpreted an ambiguous provision in a contract in light of then-applicable state law.

Instead, Mr. Coles pointed my attention to Williston on Contracts, which states that, even when not expressly stated, the parties to a contract are presumed to have contracted with reference to existing principles of law. But I think that provision proves too much, because plaintiffs are essentially arguing that a state legislature can never change the law, that, while not even referenced in the parties' agreement, might possibly impact a party's contractual rights. I do not believe this to be the case, as the Supreme Court recognized in the context of California law in the decision of *DirectTV Incorporated v. Imburgia*, 136 Supreme Court 463 from 2015.

And even accepting plaintiffs' arguments that the settlements were negotiated with reference to Section 50-a, the Court must also accept that such settlements were negotiated with reference to FOIL, which is, as the parties know, to be liberally construed, and its exemptions narrowly tailored so the public is granted maximum access to the records of government. I'm citing here to *Capital Newspapers, Div. of*

Hearst Corp. v. Whalen, 69 N.Y.2d 246 from 1987.

I also agree with defendants' argument that an agency cannot bargain away the public's right to access public records. And there are cases for this point. I bring to the parties' attention, *LaRocca v. Bd. of Educ. of Jericho Union Free School Dist.*, 632, N.Y.2d 576 (2d Dep't 1995); and *Washington, D.C. Post Company vs. New York State Insurance Department*, 61, N.Y.2d 557 from the Court of Appeals in 1984.

And in that latter case, *Washington Post*, the insurance department asserted confidentiality as ground to withhold documents from public inspection. The Court of Appeals there held that the insurance department's long-standing promise of confidentiality was irrelevant to whether the requested documents fit within the legislature's definition of records under FOIL. And it explained that because of FOIL exemption for records confidentially disclosed to an agency had been removed, the insurance companies had no authority to use its label of confidentiality to prevent disclosure. And that's effectively the same argument that plaintiffs are making here, that an agreement with an agency to keep certain records confidential can be enough to prohibit public access to such records.

But putting all of those legal issues to the side -- and they are considerable -- the plaintiffs have only provided the Court with the most cursory explanations of these purported

settlement agreements. I've not been provided with a single example of a settlement agreement with the NYPD. No witness, no declarant has explained to me that she or he entered into a settlement agreement with the NYPD in reliance on Section 50-a. I am not going to speculate as to what rights the settlement agreements provide to other parties. And instead, I'm going to turn to the constitutional claims.

Plaintiffs argue first that the release of these records will violate officers' due process by, number one, calling into question their good name, reputation, honor, or integrity, and thereby stigmatizing them; number two, becoming available to employers, credit agencies, landlords bank officers, potentially eviscerating the futures of many of the petitioners; and number three, violating what actually are rather vague reliance interests that plaintiffs claim they had in the City's guarantee of the confidentiality that such records would remain confidential when the officers decided to respond to allegations of misconduct.

I don't see this in their briefing as a basis that plaintiffs continue to advance for the due process claim. Instead, I believe the only right to confidentiality plaintiffs can claim, prior to the repeal of 50-a, was 50-a itself. And so I do not find that there is an adequately alleged or adequately demonstrated deprivation of some other liberty or property right aside from the repeal of 50-a itself. And so

plaintiffs' due process claim is really one of stigmatic or reputational harm and the alleged consequences that flow from that harm. And a loss of reputation without more is insufficient to establish a procedural due process claim. I cite to the Supreme Court's decision in *Paul vs. Davis*, 424 U.S. 693. Instead, plaintiffs are required to establish a stigma-plus claim. And in such claims, courts recognize a protected liberty interest in interest to one's reputation, which is the stigma, coupled with the deprivation of some tangible interest or property right, and that is the plus. As one of example of that, I cite to *DiBlasio v. Novello*, 344 F.3d 292, (2d Cir. 2003); and on the state court side, the matter of *Lee TT. v. Dowling*, 87 N.Y.2d 699. Plaintiffs argue that the release of "unsubstantiated and non-final allegations" will not only cause reputational or stigmatic harm, but will also interfere officers' future employment opportunities.

And so I now turn to the elements of the stigma-plus claim, and they include that the plaintiff must show the utterance of a statement sufficiently derogatory to injure his or her reputation, that is, capable of being proved false, and that he or she claims is false, and also a material state-imposed burden, or state-imposed alteration of the plaintiffs' status or rights. I'm citing here and quoting from *Vega v. Lantz*, 596 F.3d 77, a Second Circuit decision from 2010. And it, in turn, is quoting to a decision of Justice

Sotomayor, when she was a judge on the Second Circuit, *at Sadallah v. City of Utica*, 383 F.3d, 34.

Now, as to the stigma prong, I find the plaintiffs have failed to establish both that defendants' statements are false and that the release of the records is a statement sufficiently derogatory to injure plaintiffs' reputation.

First, I note that the records at issue are not false. Plaintiffs claim that defendants' worldwide transmission of unsubstantiated and non-final allegations, including those that are misleading are simply false, will stigmatize the identified officers and result in public approbrium and damage to their reputations.

But by equating records classified by the agencies as non-final and unsubstantiated with records that are false and misleading, plaintiffs misstate the nature of the records at issue here.

And as noted previously, plaintiffs are eliding the distinction between the underlying allegation, which may be about conduct that never happened, and the actual record being released, which record states the outcome of an investigation into that complaint. Even if the charge is unsubstantiated or non-final, any stigma or falsity is addressed by the record, which makes clear that the charges -- for example, unsubstantiated -- are non-final.

And the records therefore have information, such as

the agency's classification or disposition of the complaint or charges, that contextualizes adequately any description of the underlying complaint or charges.

Accurate descriptions of allegations and personnel actions or decisions that are made public are not actionable, "even when a reader might infer something unfavorable about the employee from these allegations." I'm quoting here from a decision of Judge Seibel's of this district: *Wiese vs. Kelly*, reported at 2009 WL 2902513. This is not a case, for example, where the defendants are uncritically publishing the allegations of misconduct made against officers as if these allegations were true. Disclosure of a record that an allegation was found to be unfounded or unsubstantiated is a true statement as to the outcome of an investigation of that allegation.

Plaintiffs have made no showing that any record that would be released by the City would inaccurately reflect the disciplinary or investigative process. Plaintiffs separately argue that, in analyzing the stigma component, courts look to the state substantive law of defamation. And they claim that the potential for members of the public to misunderstand the record gives rise to stigma, because specifically "under New York defamation law, when 'a reasonable listener could have concluded that the statement was conveying a fact about the plaintiff that was susceptible of a defamatory connotation,'

the statement is actionable."

I'm quoting here from the plaintiffs' brief at page 14. They're in turn citing to a second department decision in *Greenberg v. Spitzer*, reported at 155 A.D.3d 27. But to establish defamation under New York law, it is "well settled" that the statement must actually be false. And I am quoting here from *Tannerite Sports, LLC v. NBC Universal News Grp.*, 864 F.3d 236, a Second Circuit decision from 2017. And here, for example, a CCRB record's statement that an allegation is unsubstantiated is not a false statement; it is an accurate depiction of an outcome of a CCRB investigation into a complaint.

Truth does provide a defense to defamation claims, as New York courts have long recognized. Plaintiffs cite no case to the contrary, nor have they offered any evidence to support the assertion that the release of these records will lead to widespread dissemination of false statements.

One article that was brought to my attention was the Guardian article, "NYPD's 10 Most unWanted." It was discussed at the PI hearing on Tuesday. It doesn't suggest otherwise. It doesn't cause me to change my decision. That article reports information about the number of allegations that the CCRB found to be substantiated and unsubstantiated for several NYPD officers. That some of the allegations cited in the article were unsubstantiated. It's not a false statement. It

is a truthful statement about the CCRB's findings or resolution of those allegations. And the CCRB or other agency findings, as to their investigations into allegations of misconduct, are not in and of themselves false, nor have or can plaintiffs allege as such.

These records are also not sufficiently derogatory to injure plaintiffs' reputation. As discussed previously in the context of my discussion of irreparable harm, plaintiffs have not established that the publication of these records will cause any concrete, particularized, actual, or imminent injury to their reputation. And for these reasons previously discussed, they have failed to establish that any of the records are likely to cause actual injury to reputation.

There may be a subset of the records at issue that are uncomplimentary in the abstract. The plaintiffs do not specify what records or what information in such records may fall into this hypothetical subset. Even so, abstract illusions to unflattering records are not evidence that public access will cause actual harm to any particular officer's reputation. And as defendants in amici have explained, the vast majority of records to be released that plaintiffs seek to enjoin simply report basic facts about a complaint or disciplinary action and the outcome of that complaint or action.

Also, as discussed repeatedly in this opinion, records disclosed by defendants will have information, dispositional

discussions, that will contextualize the description of the complaint or charges provided, allowing members of the public, and those making future hiring discussions, to evaluate the complaint, the ensuing investigation, and its outcome independently.

Now, plaintiffs have failed to establish that these records are false and they have, therefore, failed to meet the stigma prong. But for the sake of completeness, I will note here that plaintiffs have also failed to meet the plus prong of the claim. And the plus prong of the stigma-plus doctrine is satisfied by the deprivation of a plaintiff's property or some other tangible interest. The *Sadallah* case, which I discussed earlier, is indicative of that point.

Plaintiffs argue that the plus is satisfied here by the potential loss of employment or future employment opportunities caused by the release of these records. Preliminarily, and as noted above, it appears that injunctive relief may be improper to address this harm based on cases like *Savage v. Gorski* that I mentioned.

But additionally, Second Circuit precedent forecloses the argument that the plus prong is satisfied by a vague allegation of potential loss of employment due to reputational harm. In *Valmonte v. Bane*, 18 F.3d 992, a Second Circuit decision from 1994, the Second Circuit explained that "the deleterious effects which flow directly from a sullied

reputation," including "the impact the defamation might have on job prospects" are insufficient to establish a protected liberty interest.

At base, vague allegations of future loss of employment are another way of claiming stigmatic harm. And for this reason, the cases on which plaintiffs rely are inapposite, because they deal with concrete harms beyond vague suggestions that reputational harm may negatively impact future job prospects. Even assuming that such loss of employment, or that these allegations could satisfy the standard, plaintiffs' alleged harm to employment prospects is so remote that it is not proof of a tangible state-imposed burden concurrent with the disclosure. To meet their burden, plaintiffs must do more than simply say that records may lead to diminished employment prospects for some vague subset of officers in the future. Again, plaintiffs failed to explain why law enforcement officers in charge of hiring would be incapable of interpreting the records disclosed by defendants.

As noted repeatedly, the dispositional discussions will contextualize the description of the complaint or charges provided. They will allow future employers to make hiring decisions by evaluating the complaint and the investigation and its outcome independently. And as to any claim that the publication of these records may cause the immediate loss of employment for some officers, plaintiffs do not explain why an

officer would lose their job. As a result of the publication of records that the employer already has access to, but even assuming for the sake of argument that the release of these records meet both the stigma and the plus prongs -- and they do not -- plaintiffs fail to allege that the officers are deprived of the process that is due, because in the creation of the records themselves, the officers are entitled to pre-deprivation disciplinary hearings, the opportunity to respond to allegations throughout the course of the investigation, and the availability of Article 78 review. So on these many bases, there is not an adequate showing as to the due process claim.

Plaintiffs separately allege a violation of the equal protection clauses of the New York and the U.S. constitutions, claiming that defendants have singled out firefighters, police and correction officers for disclosure of unfounded disciplinary records, but have not done so for the myriad other state license professionals. I'm quoting here -- and paraphrasing a bit -- from plaintiffs' brief at page 19: In this regard, New York state equal protection guarantees are coextensive with the rights provided under the Federal Equal Protection Clause.

And the plaintiffs concede that they are not members of a protected class, such that the appropriate level of scrutiny is a rational basis review. And "as a general rule,

the equal protection guarantee of the constitution is satisfied when the government differentiates between persons for a reason that there's a rationals relationship to an appropriate governmental interest." I'm quoting here from *Able vs. United States,* 155 F.3d, 628, a Second Circuit decision from 1998.

Plaintiffs' equal protection claims fail for three independent reasons: First, they are foreclosed by Supreme Court precedent; second, plaintiffs fail to establish that they are similarly situated to the City employees they cite as comparators; and third, plaintiffs fail to establish the defendants' actions are not rationally related to the government's interest in transparency and accountability.

So to begin, plaintiffs' equal protection claims are foreclosed by the Supreme Court's decision in *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591 from 2008. And *Engquist* precludes equal protection claims challenging different applications of discretion to different employees, because permitting such claims would constitutionalize all discussions by a public employer concerning its employees. And that's exactly what plaintiffs are trying to do here.

Second, "to satisfy the 'similarly situated' element of an equal protection claim, the level of similarity between plaintiffs and the persons with whom they compare themselves must be extremely high." I'm quoting here from *Neilson v. D'Angelis,* 409 F.3d, 100, a Second Circuit decision from 2005

that was overruled on other grounds in 2008.

But plaintiffs work in law enforcement, and the very nature of their roles, vis-a-vis the public, is very different from other City employees. They are not similarly situated. And I believe plaintiffs conceded as much at oral argument. Officers patrol the streets with firearms and are authorized to use force under the aegis of state power. And therefore, a state-licensed medical physicist is just not similarly situated to a City-employed police officer or correction officer.

Third, and related to the previous point, the City has articulated a rational and nondiscriminatory basis for treating the plaintiffs differently than other City employees, if it could be found that these employees were similarly situated. As the city and the state legislature articulated, there are strong governmental interests in accountability and transparency. And the role of police officers in society, the unique responsibilities they carry, the harms they are capable of inflicting on the public, also explain why the City might choose to release records about investigations into allegations of misconduct, but might not proactively release similar records by other city employees, such as teachers or sanitation workers, who do not have similar powers.

Plaintiffs' only explanation for why this is irrational rest on an opinion of a Committee on Open Government. And this opinion opined that, even after repeal of

Section 50-a, requests for disciplinary records of law enforcement must be reviewed in the same manner as a request for disciplinary records of any other public employee. This instruction, this advisory opinion, is not -- or does not establish a constitutional violation.

And this final claim under Article 78 takes a different species -- or there are different varieties of it. The first argument of it is that the repeal of Section 50-a was in and of itself arbitrary and capricious. And I feel that claim was throughly rebutted by the Amicus briefs filed in this case, in which defendants and the amici explained that the legislature thoroughly considered and rejected plaintiffs' arguments for exempting unsubstantiated, unfounded, and exonerated allegations from disclosure. And as evidence that the legislature considered plaintiffs' concerns about privacy and safety, they made a reasoned determination to enact the provisions additional to the New York Public Officers' Law, which requires the redaction of certain information in law enforcement disciplinary histories, including a medical history, home address, personal telephone number, personal email address, and mental health service, and that that was the correct balance to strike. The legislature also added a provision permitting agencies to redact records pertaining to technical infractions. And so I'm entirely unpersuaded that the repeal itself was arbitrary or capricious.

The second version of the argument that I was able to discern from the briefing was that the error of law, it was arbitrary and capricious for defendants to interpret the repeal of Section 50-a in the way that they have and to change decades of agency practice on the protections afforded by them by 50-a in addressing, on a going forward basis, requests for information under FOIL.

But "in reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. I'm citing here and quoting from *Matter of Gilman v. New York State Division of Housing and Community Renewal*, 99 N.Y.2d 144 from the Court of Appeals from 2002.

On this record, I will not find that the NYPD's and the CCRB's planned disclosures, in light of the repeal of 50-a, are arbitrary and capricious. Rather, it appears that the planned disclosures accord with the legislative purposes of both the repeal of 50-a, the concurrent amendments to Public Officers' Law, Section 89, and FOIL.

And at oral argument, corporation counsel repeatedly assured the Court that the agencies have merely removed Section 50-a from their list of exemptions or considerations in responding to FOIL requests. They do, however, continue to do a review of the records in response to FOIL requests to

determine whether any of the other FOIL exemptions apply. In many cases that is done on an individualized basis; and with respect to certain officer reports, the protections are done at the outset with respect to the group of records that is produced.

But to the extent that other FOIL exemptions remain to protect officers' privacy and safety rights, those rights still exist. And so plaintiffs' final argument on this point is that the NYPD has not gone through the formal rule-making process pursuant to the City Administrative Procedures Act. And they cite a rule of the City of New York that provides for public access to NYPD disciplinary hearings. But the repeal of section 50-a simply makes the public's right broader than what the City of New York rule already provides. It is not inconsistent with the rule. And I, therefore, reject plaintiffs' citation to *Lynch v. New York City Civilian Complaint Review Bd.*, 125 N.Y.S.3d 395 from the this year. Because in that case, CCRB had amended its rules and resolution to begin investigating sexual misconduct which had previously been referred to the NYPD internal affairs bureau. Here, the CCRB and the NYPD have not amended their rules. They are merely reacting to a change in the law which they themselves did not occasion, and plaintiffs cannot show otherwise.

I'm now going to turn to balance of hardships and the balance of the equities. And I'll ask the parties for this

last section of the opinion to continue to have your phones on mute.

The Second Circuit's decision in the *Trump vs. Deutsche Bank* case that I mentioned earlier contained an extensive discussion of that Court's and the Supreme Court's that evolving standards for preliminary injunction motions. And that discussion included analysis of the standard articulated in *Winter vs. Natural Resources Defense Counsel Incorporated,* 555 U.S. 7 from 2008. And in that particular setting, there was also a requirement, in addition to the showing of a likelihood of success on the merits and the showing of irreparable harm, that the balance of equity tips in the movant's favor and that an injunction is in the public interest.

And ultimately, the *Trump* court erred in favor of inclusion. They proceeded to consider not only whether appellants had met the governing likelihood of success standard, but also whether they had satisfied the other requirements in one or more of these three standards: Sufficiently serious questions going to the merits of their claims to make them fair ground for litigation; a balance of hardships tipping decidedly in their favor; and the public interest favoring an injunction. And as I've mentioned earlier, in the most recent decision authored by Judge Lynch, there was a suggestion that the latter two would merge

together.

But beginning with the issue of the balance of hardships, the Court finds that they do not tip decidedly in plaintiffs' favor. Plaintiffs have claimed a variety of harms, contractual and constitutional. But for the reasons that I've just described, most of these claims fail even for want of actual substantiation or because the law is not what plaintiffs wish it to be. But conversely, were I to enjoin release of these materials, defendants would suffer, as they would be stymied and improperly so, in their efforts to comply with recent legislative developments. More broadly, I find that injunction disserves the public interests.

After years of discussion and debate, New York's legislature determined to repeal Section 50-a, and thereby bring themselves in line with most of the other states in their treatment of disciplinary records. And in this regard, I'm remembering one of the amici noted that -- I believe it was -- New York and Delaware were deemed to be outliers in this regard.

But turning to the public interest, the decision to amend Section 50-a was not made haphazardly. It was designed to promote transparency and accountability, to improve relations between New York's law enforcement communities and their first-responders and the actual communities of people that they serve, to aid law makers in arriving at policy-making

decisions, to aid underserved elements of New York's population and ultimately, to better protect the officers themselves. The decision to amend was also made with due regard for the safety and privacy interests of the affected officers. Amendments were made to the Public Officers' Law that mandated the redaction of certain categories of information that permitted the withholding of other categories of information. And I reject the foundational argument that no one -- law enforcement or civilian -- can appreciate the distinctions between substantiated, unsubstantiated, exonerated, unfounded and non-final claims.

I also find, contrary to plaintiffs' arguments, that the agencies in question, the defendant agencies in this case, have neither forgotten nor disregarded FOIL and its exemptions. To grant the injunctive relief sought on this record would subvert the intent of both the legislature and the electorate it serves. And with the limited exception described above regarding to Schedule A command discipline violations that have been resolved in a particular way, I am denying plaintiffs' motion for injunctive relief.

As with the modification of my injunctive motion a couple of weeks ago, I'm staying this decision until Monday at 2:00 p.m. so the plaintiffs can, if they wish to do so, appeal to the Second Circuit. That is my decision.

I believe -- and I don't mean to put her on the spot,

but I believe that Ms. Barker remains on the line.

Is that correct.

MS. BARKER: Yes, your Honor.

THE COURT: Ms. Barker, you had asked me -- and I promised to talk to you -- about a schedule for the motion to dismiss.

Given the amount of time that I have kept everyone on this call, may I ask you to confer with the plaintiffs and to propose for me a schedule for that motion?

MS. BARKER: Yes, your Honor. No problem.

THE COURT: Okay. Thank you.

That is all I have to discuss. I believe I've addressed everything with the parties. And with that, I am going to adjourn this proceeding.

I'm going to thank you for your patience. I'm going to thank the vast majority of you that knew how to use your mute buttons, and I'll smile at those of who you who did not. And I wish you all a safe weekend.

Thank you. We are adjourned.

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